

No. 46236-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Norman Rooney,

Appellant.

Cowlitz County Superior Court Cause No. 13-1-01694-7

The Honorable Judge Stephen Warning

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Rooney's motion to suppress.
2. The search of Mr. Rooney's bedroom violated his rights under the Fourth and Fourteenth Amendments and Wash. Const. art. I, § 7.
3. Police violated Mr. Rooney's rights by searching his room without a warrant when he was present and objected to the search.
4. The court erred by entering finding of fact 21.
5. The court erred by entering conclusion of law 2.
6. Police violated Mr. Rooney's rights by searching his room without probable cause to believe White lived in the room.
7. The court erred by entering finding of fact 6.
8. The court erred by entering finding of fact 7.
9. The court erred by entering conclusion of law 1.

ISSUE 1: The police may not search a home based on authority related to one resident when another party with common authority over the premises is present and objects. Here, officers searched Mr. Rooney's bedroom, over his objection, based solely on the fact that another resident of the house was on community custody. Did the search of Mr. Rooney's bedroom violate his rights under art. I, § 7?

ISSUE 2: A community corrections officer can only search the areas of a home in which s/he has probable cause to believe a probationer lives. Here, several officers assumed White lived in Mr. Rooney's bedroom based solely on her presence in the room with her baby and their observation of a purse and some pink items on the floor. Did the search of Mr. Rooney's bedroom violate his rights under the Fourth and Fourteenth Amendments and art. I, § 7?

10. The frisk of Mr. Rooney's pants violated his rights under the Fourth Amendment and art. I, § 7.

11. The police did not have reasonable suspicion that Mr. Rooney was armed and presently dangerous to justify a frisk of his pants.
12. The court erred by entering finding of fact 11.
13. The court erred by entering finding of fact 17.
14. The court erred by entering conclusion of law 3.
15. The court erred by entering conclusion of law 4.

ISSUE 3: Officers may only frisk a person for weapons if they have reasonable suspicion to believe that s/he is armed and presently dangerous. Here, the officers frisked Mr. Rooney solely because he had decorative swords and axes on display in his bedroom. Did the frisk violate Mr. Rooney's rights under the Fourth and Fourteenth Amendments and art. I, § 7?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Norman Rooney was asleep in his bedroom when two Department of Corrections (DOC) officers and a team of police knocked on the door of his house. RP 15. Mr. Rooney lived with his children; his mother; a friend, Crystal Goebel; his girlfriend, Vanessa Barker; and at least one other adult. RP 9-10, 38, 44-45, 54. His bedroom was on the first floor of the house, right next to the front door. RP 30. Mr. Rooney shared his room with Barker and Goebel. RP 75.

The DOC officers had received a tip that Alexandria White and her infant were also living at the house. RP 9. White was on community custody. RP 5. She had failed to update her address with DOC. RP 7. The officers had a warrant to arrest her for violating the conditions of her community custody. RP 7.

When the officers entered the house, White was walking through Mr. Rooney's bedroom. RP 29. White's baby was asleep in Mr. Rooney's bedroom in his baby carrier. RP 31, 58-59.

The officers woke Mr. Rooney. RP 22. He was only wearing boxer shorts. RP 22. They told him that they were going to search his bedroom and he objected. RP 24. He pointed out that he was not on

community supervision. RP 22. White told the officers that she did not live in the bedroom. RP 17.

Mr. Rooney asked if he could put on some pants. RP 22. The officers said that any pants he put on would be searched as well. RP 22. Mr. Rooney picked up pants from the floor. RP 22. He did not make any furtive movements. RP 34. One of the officers lunged for the pants and felt a gun inside. RP 23. They seized the gun. RP 23-24.

The officers searched Mr. Rooney's bedroom and found drugs. RP 26. The state charged him with three counts of drug possession and one count of unlawful possession of a firearm.¹ CP 1-3.

Mr. Rooney moved to suppress the evidence seized from his bedroom, including the gun seized from his pants. CP 11-18.

At the suppression hearing, the officers testified that they had seen a purse, a pink backpack, and a baby carrier in Mr. Rooney's bedroom. RP 12. They also testified that Mr. Rooney had decorative swords and axes hanging on his bedroom wall. RP 15.

White testified that she was staying with her baby in the living room while she waited for an upstairs room to be cleared out. RP 61, 85-86.

¹ Mr. Rooney had been previously convicted of a felony. RP 25.

The court denied Mr. Rooney's motion to suppress. CP 31. The judge upheld the search of the room, finding the officers had sufficient cause to believe that White lived in Mr. Rooney's bedroom. RP 30.

The court noted that the search of Mr. Rooney's pants posed a more difficult question. The court found that Mr. Rooney made no furtive gestures. RP 105, 111. Instead, the court held that the decorative swords and axes on the wall of Mr. Rooney's bedroom, alone, were sufficient to create a reasonable suspicion that he was armed and dangerous. RP 111. In upholding the warrantless frisk, the judge said, "I think it's just about as far as [the reasonable suspicion requirement] can be stretched." RP 111.

The court found Mr. Rooney guilty at a stipulated facts trial. CP 32-37. This timely appeal follows. CP 61-79.

ARGUMENT

THE EVIDENCE ADMITTED AGAINST MR. ROONEY WAS SEIZED IN VIOLATION OF HIS RIGHTS UNDER THE FOURTH AMENDMENT AND ART. I, § 7.

A. Standard of Review.

The validity of a warrantless search is reviewed *de novo*. *State v. Westvang*, 174 Wn. App. 913, 918, 301 P.3d 64 (2013). A trial court's findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *Id.* In the absence of a finding on a factual issue,

an appellate court presumes that the party with the burden of proof failed to sustain its burden on the issue. *Id.* at 916, n. 4.

B. Warrantless searches are *per se* unreasonable.

Both the Fourth Amendment to the federal constitution and art. I, § 7 of Washington's constitution prohibit searches and seizures without a search warrant. *Westvang*, 301 P.3d at 68; U.S. Const Amends. IV; XIV; art. I, § 7. This "blanket prohibition against warrantless searches is subject to a few well guarded exceptions..." *Id.* When police have ample opportunity to obtain a warrant, courts do not look kindly on their failure to do so. *State v. White*, 141 Wn. App. 128, 135, 168 P.3d 459 (2007) (internal citation omitted).

The state bears the heavy burden of showing that a search falls within one of the narrowly drawn exceptions to the warrant requirement. *Westvang*, 301 P.3d at 68. Before evidence seized without a warrant can be admitted at trial, the state must establish an exception to the warrant requirement by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

Unlike the Fourth Amendment, art. I, § 7 focuses on individual rights and the expectation of privacy, not the reasonableness of police conduct. *State v. Monaghan*, 165 Wn. App. 782, 787, 266 P.3d 222

(2012). Thus, a warrantless search presumptively violates the state constitution whether or not the police acted in good faith. *Id.*

C. Under the common authority rule, the officers were not empowered to search Mr. Rooney's bedroom over his objection.

Under art. I, § 7, when two parties have common authority over a residence and both are present, the state must establish an exception to the warrant requirement for each of them in order to justify a search. *White*, 141 Wn. App. at 136 (citing *State v. Morse*, 156 Wn.2d 1, 4–5, 123 P.3d 832 (2005)). The authority to search related to one resident does not confer the authority to search related to other parties who are present and have equal or greater control over the premises. *Id.*

A community corrections officer may search the person, residence, automobile, or personal property of someone under community supervision if there is reason to believe that s/he has violated a condition of supervision. RCW 9.94A.631. However, this does not allow the officer to search areas that are not associated with the person under supervision. *State v. McKague*, 143 Wn. App. 531, 545, 178 P.3d 1035 (2008).

Here, the officers had reason to believe that White had violated her community custody conditions. RP 7. If White had been the only resident present, the officers would have had authority to search under the

exception for DOC searches.² RCW 9.94A.631; *White*, 141 Wn. App. at 138.

But Mr. Rooney had common authority over the room.³ He was not under DOC supervision. RP 22. He was present and explicitly objected to the search. RP 24. No exception to the warrant requirement permitted the officers to search the room over his objection.

Because Mr. Rooney had common authority over his bedroom, White's status as a DOC supervisee was insufficient to justify its search. *White*, 141 Wn. App. at 136. The state cannot demonstrate that an exception to the warrant requirement justified the warrantless search as to Mr. Rooney. *Westvang*, 301 P.3d at 68. All of the evidence seized from the room – the drugs and the gun -- should have been suppressed. *White*, 141 Wn. App. at 143. Mr. Rooney's convictions must be reversed and the evidence suppressed on remand. *Id.*

² For purposes of this argument, appellant assumes White stayed in Mr. Rooney's room with him.

³ White actually told the officers that she was staying in the house's living room until an upstairs bedroom was cleared out for her. RP 21, 61, 85-86. As argued below, the officers did not have probable cause to believe that White occupied the room they searched. For the purposes of this issue, however, Mr. Rooney had *at least* common authority – if not exclusive authority – over his bedroom.

D. The officers did not have probable cause to believe that White lived in Mr. Rooney's bedroom.

A DOC officer's authority over a supervisee is limited to searches of "*his* [or her] home, and *his* [or her] effects." *McKague*, 143 Wn. App. at 544 (emphasis in original). Accordingly, an officer may not search a residence unless s/he has probable cause to believe that the probationer lives there. *State v. Winterstein*, 167 Wn.2d 620, 630, 220 P.3d 1226 (2009). Likewise, the officer may only search areas of the premises that are actually associated with the supervisee. *McKague*, 143 Wn. App. at 545.

The probable cause standard is necessary to protect the privacy interests of third parties. It also protects citizens from "rash and unreasonable interferences with privacy and from unfounded charges of crime." *Winterstein*, 167 Wn.2d at 629.

The probable cause inquiry must be limited to reasonably trustworthy information available to the officer at the time of the search. *Id.* The *Winterstein* court invalidated a residence search because the searching officers lacked information that would lead a person of reasonable caution to believe that the probationer lived there. *Winterstein*, 167 Wn.2d at 630.

Here, the information available to the officers was insufficient to establish probable cause to believe that White lived in Mr. Rooney's bedroom. *McKague*, 143 Wn. App. at 545. The only indication that White was associated with the bedroom was that she was walking out of the room when the officers arrived; her baby was asleep in the room; and there was a purse, a pink backpack, and the baby carrier on the floor. RP 11-17. White told the officers that she did not live in the room. RP 21. Rather, she was staying in the living room until an upstairs bedroom opened up. RP 61, 85-86.

This information was insufficient to convince a person of reasonable caution that White was living in the Mr. Rooney's bedroom. There was no evidence that the purse and other women's items belonged to White rather than to Mr. Rooney's girlfriend, Goebel, his mother, or any other woman who lived in the home. RP 9-10, 44-45, 54. The officers did not find any baby clothes, a crib, or other items indicating that White's baby lived in Mr. Rooney's bedroom. RP 4-50.

Likewise, simply standing in the room and placing her child for a nap inside did not create probable cause to believe that White lived in Mr. Rooney's bedroom. Several people lived in the house. RP 9-10, 44-45. The living room was likely too noisy for a baby to sleep. The officers had

just knocked on the door. White could have placed her son in Mr. Rooney's bedroom so he could continue sleeping undisturbed.⁴

The officers did not ask the third parties in the home whether White lived in Mr. Rooney's bedroom. RP 4-50. They did not have enough information for a person of reasonable caution to conclude that White lived in the room they searched.

DOC did not have probable cause to believe that White lived in Mr. Rooney's bedroom. *McKague*, 143 Wn. App. at 545. Accordingly, her community custody status cannot justify the warrantless search of the room. *Id.* The trial court should have suppressed all of the evidence located during the search, including the gun found in Mr. Rooney's pants. *Id.* Mr. Rooney's convictions must be reversed and the evidence suppressed on remand. *Id.*

- E. The officers did not have reasonable suspicion that Mr. Rooney was armed and dangerous, and thus had no justification for searching his pants.

An officer may conduct a frisk for weapons when s/he possesses specific and articulable facts creating an objectively reasonable suspicion that a person is armed and presently dangerous. *State v. Harrington*, 167 Wn.2d 656, 668, 222 P.3d 92 (2009). The state must prove this

⁴ Indeed, that is what White testified had occurred. RP 58.

foundation by clear, cogent, and convincing evidence. *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010).

Here, the court concluded that the frisk of Mr. Rooney's pants was justified solely by the collectible swords and axes hanging on his wall. RP 111. The court found that Mr. Rooney did not make any furtive movements and that it was reasonable for him to seek to put on pants. RP 111. The court concluded that the swords and axes on display were the only factor that could have created reasonable suspicion to frisk Mr. Rooney. RP 111.

The decorative weapons were readily visible; Mr. Rooney made no attempt to conceal them. The swords did not indicate that Mr. Rooney owned any weapons small enough to be hidden in his pants. Mr. Rooney was legally entitled to own the decorative swords. They did not represent any violent or criminal behavior on his part.

There was no logical connection between the collectible swords and axes on display in Mr. Rooney's bedroom and the conclusion that he was armed and presently dangerous at the time of the frisk.

Because the officers did not have reasonable suspicion that Mr. Rooney was armed and presently dangerous, the frisk of his pants violated his Fourth Amendment and art. I, § 7 rights. *Harrington*, 167 Wn.2d at

668. The gun should have been suppressed. *Id.* Mr. Rooney's unlawful possession of a firearm conviction must be reversed. *Id.*

CONCLUSION

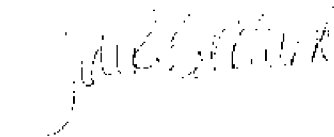
Mr. Rooney was present and objected to the search of his bedroom. Officers lacked authority to search it based on White's DOC status. The officers also lacked probable cause to believe that White lived in the bedroom. All of the evidence seized from Mr. Rooney's bedroom should have been suppressed.

Additionally, the officers did not have reasonable suspicion that Mr. Rooney was armed and presently dangerous. The frisk of his pants for weapons was therefore unjustified. The gun seized from his pants should have been suppressed.

All four of Mr. Rooney's convictions must be reversed. The case must be remanded for suppression of the evidence.

Respectfully submitted on September 29, 2014,

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CERTIFICATE OF SERVICE

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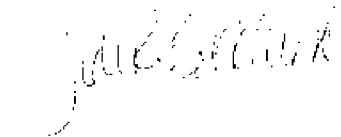
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 29, 2014.



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